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95-1732

No. _____

Supreme Court, U.S.
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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1995

CITY OF PORTLAND,

Petitioner,

v.

NORTHWEST ENVIRONMENTAL ADVOCATES,
A non-profit Oregon corporation and NINA BELL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI and APPENDIX Volume I

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QUESTIONS PRESENTED

1. Does the Clean Water Act authorize federal jurisdiction for citizen suits to enforce State water quality conditions of an NPDES permit when those conditions are not translated into specific discharge limitations?

2. Is an NPDES permittee shielded from a Clean Water Act citizen suit for violations of State water quality standards in a receiving water for discharges that are authorized under its permit?

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CITY OF PORTLAND,

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NORTHWEST ENVIRONMENTAL ADVOCATES,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The City of Portland, Oregon, hereby petitions this Court for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review that Court's Opinion in the case of *Northwest Environmental Advocates v. City of Portland,* No. 92-35044.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit of which review is sought is reported at 56 F. 3d 979 (1995). The Opinion is reproduced in the Appendix at App-34. A previous Opinion, withdrawn upon a petition for rehearing, was reported at 11 F. 3d 900 (1993), and is reprinted at App-1. The Order denying rehearing, with dissent, appears at 74 F.2d 945 (1996), and is reproduced at App-69 The District Court Opinion reversed by the Ninth Circuit is found at App-77.

JURISDICTION

The judgment of the Ninth Circuit is dated January 24, 1996. This Court has jurisdiction to review the Opinion below pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This matter involves the Clean Water Act, 33 U.S.C. §§ 1251 - 1376. The relevant provisions are set out in the appendix.

STATEMENT OF THE CASE

A. The Facts

1. The City's Sewer System

When Petitioner City of Portland's sewer system was first constructed, beginning in the early 1860's, the sewers were "combined" to carry both sanitary wastes and

storm runoff. These early sewers discharged directly into the nearby Willamette River and Columbia Slough. In 1947, the City began to build massive interceptors at the end of the sewer lines to capture the sewage before it entered the water and pipe it to a sewage treatment plant.

However, neither the interceptors nor the sewage treatment plant has unlimited capacity. The interceptors were built to handle three times the average dry weather flow. During times of high rainfall, the capacities of both the interceptors and the treatment plant are exceeded. The pipes that transport waste directly to the Willamette River and Columbia Slough remain in place as a safety valve for the system. Instead of backing up in basements and streets, the excess flow is discharged directly into the River and Slough. Although the total amount of the discharge is large, it is approximately 90% storm water. The events during which these pipes discharge, and sometimes the pipes themselves, are called "combined sewer overflows" or CSOs.

Portland is just one of many communities throughout the country that rely upon combined sewer systems. The Environmental Protection Agency (EPA) estimated in 1989 that 1200 communities still employed CSOs.

The City's sewer system has operated under National Pollution Discharge Elimination System (NPDES) permit since the advent of that permit process. Its permits were issued by the State of Oregon Department of Environmental Quality and approved by the EPA. The City's 1984 NPDES permit, at issue here, included, as

permitted discharges, the CSOs that discharge into the Willamette River and Columbia Slough.[1]

The permit contained effluent limitations for discharges from two outfalls from the City's treatment facility. It went on to state:

> The permittee shall provide interception of at least three times the dry weather flow before discharge shall occur at any diversion structure [CSO]. The overflow from these diversion structures shall be minimized and/or eliminated as much as practicable during the water recreation season (June 1 to October 31).

The permit also contained the following language:

> Notwithstanding the effluent limitations established by this permit, no wastes shall be discharged and no activities shall be conducted which will violate Water Quality Standards as adopted in OAR [Oregon Administrative Rules] 340-41-445 except in the following defined mixing zone: The mixing zone shall consist of a 100 foot radius from the point of discharge.

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[1] Respondents challenged whether the CSOs were covered by the 1984 permit. Both decisions of the Ninth Circuit upheld the trial court's conclusion that the CSOs were covered by the City's permit.

It was only in 1989 that EPA declared, after years of approving NPDES permits for combined sewer systems such as Portland's, that CSOs would have to meet technology-based requirements of the Clean Water Act and applicable State water quality standards. EPA National CSO Control Strategy, 54 Fed. Reg. 37370, Sept. 8, 1989. Recognizing that such changes could not be achieved overnight, EPA also authorized the use of administrative enforcement orders to require compliance within the shortest reasonable time.[2] In 1991, the State Department of Environmental Quality and the City entered into a Stipulation and Final Order, under which the City agreed to replace the CSO system at a cost of between $500 million and $1.2 billion dollars.[3] Respondents participated in the extensive public process that led to the Stipulation and Final Order. The City has been moving forward rapidly to carry out the terms of the Stipulated Final Order.

Respondent NWEA gave notice of intent to sue on February 1, 1991, and on April 16, 1991, respondents filed this action under the citizen suit provision of the Clean Water Act, 33 U.S.C. § 1365. The District Court had jurisdiction under 28 U.S.C. § 1331.

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[2]In 1994, EPA published its final Combined Sewer Overflow (CSO) Control Policy, which addressed long-term implementation of controls for CSOs. 59 Fed. Reg.18688, April 19, 1994.

[3]The City's 1984 permit remained in effect during negotiations until the issuance of the new permit in 1991.

B. The District Court Decision

The District Court bifurcated the proceeding with the agreement of the parties. The first phase addressed two issues: 1) were the CSOs covered by the City's 1984 NPDES permit; and 2) could the respondents sue the City for water quality violations resulting from CSO discharges. Issues relating to the number of actual violations and any penalties were to be decided subsequently, if necessary. In January 1992, the District Court issued an opinion and judgment in favor of the City, ruling that the CSOs were permitted discharges under the City's 1984 NPDES permit and that violations of State water quality standards are actionable in citizen suits only if they are incorporated into an NPDES permit through effluent limitations.

C. The Court of Appeals Decisions

On December 10, 1993, the Ninth Circuit Court of Appeals issued its first Opinion in the case, affirming the District Court (*NWEA I*). App-1 The Court of Appeals, in an Opinion by Judge Ingram, held that the CSOs were permitted under the City's 1984 permit. It further held, after reviewing the statutory language, the legislative history, the relevant case law and the practical considerations facing permit holders, that "under 33 U.S.C. § 1365, water quality standards are unenforceable by way of a citizen suit unless they have been translated into end-of-pipe effluent limitations." Judge Pregerson dissented from only the holding on citizen suit jurisdiction.

Respondents filed a petition for rehearing/suggestion for rehearing *en banc*. Although the full court voted to

deny rehearing *en banc* on April 25, 1994, the panel did not issue the mandate within seven days as required by Federal Rule of Appellate Procedure 41(a). Instead, the panel resumed control of the case and on June 7, 1995, withdrew the first Opinion and issued a new Opinion (*NWEA II*). It affirmed the District Court's conclusion that the CSOs were permitted under the City's 1984 permit, but reversed the District Court on the question whether Congress provided jurisdiction for citizen suits to enforce water quality standards that are not translated into end-of-pipe limitations. The Court held that "NWEA has standing to enforce water quality standards contained in Portland's NPDES permit." App-60. *NWEA II* was written by Judge Pregerson, with a dissent on the issue of citizen suit jurisdiction from Judge Kleinfeld.

The City then filed a petition for rehearing/ suggestion for rehearing *en banc*. Rehearing was denied by the panel and a vote on suggestion for rehearing *en banc* failed to receive a majority of votes. However, Judge O'Scannlain filed a dissent, in which he was joined by Circuit Judges Hall, T.G. Nelson and Kleinfeld. App-70.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT DECISION CONFLICTS WITH DECISIONS OF OTHER CIRCUITS REGARDING THE SCOPE OF FEDERAL COURT JURISDICTION GRANTED FOR CITIZEN SUITS IN THE CLEAN WATER ACT AND THE SHIELD PROTECTION PROVIDED BY AN NPDES PERMIT

The decision in *NWEA II*, in the words of Judge O'Scannlain, "contradicts the plain language of the Clean Water Act, conflicts with a prior decision of [the Ninth] [C]ircuit, and creates a needless intercircuit conflict with all courts of appeals that have addressed the issue." App-76. It provides another "novel application of federal statutory law," *See Meghrig v. KFC Western, Inc.*, 64 U.S.L.W. 4135, (U.S. March 19, 1996)(No. 95-83), and conflicts with other circuit court decisions.

The Ninth Circuit has wrongly interpreted the scope of citizen enforcement authorized in the Clean Water Act and has allowed an inappropriate expansion of federal court jurisdiction. On the basis of *NWEA II*, State permit writers can create federal jurisdiction not granted by Congress by inserting conditions in NPDES permits. The decision in *NWEA II* has blurred the Clean Water Act distinction between effluent limitations (33 U.S.C. § 1311) and water quality standards (33 U.S.C. § 1313) and requires federal courts, rather than federal and state regulators, to interpret and enforce water quality standards against individual permit holders. In addition, in contravention of the "permit as a shield" provision of 33 U.S.C. §1342(k), it has authorized a citizen suit against the City of Portland,

even though it ruled that the City's CSOs were permitted discharges under the City's NPDES permit, thereby abrogating the permit as a shield protection of the Act.

A. The Statutory Scheme Differentiates Effluent Limitations and Water Quality Standards

The Clean Water Act establishes a system for EPA or delegated States to issue NPDES permits with conditions that allow the discharge of pollutants, 33 U.S.C. § 1342. The statute establishes two levels of control. It is designed to implement and enforce water quality standards which id does by imposing only effluent limitations in permits, not through generic standards themselves.

In developing the permits for individual dischargers, the EPA or the States establish for each discharger effluent limitations, which "restrict the quantities, rates, and concentrations of specific substances which are discharged . . .." *Arkansas v. Oklahoma*, 503 U.S. 91, 101, 112 S.Ct. 1046, 117 L.Ed.2d 239, 251(1992). Effluent limitations include "those necessary to meet water quality standards." 33 U.S.C. §1311. Water quality standards, on the other hand, do not govern the actions of dischargers directly. Water quality standards "establish the desired condition of a . . . waterway." *Arkansas v. Oklahoma, supra,* 117 L.Ed.2d at 251. Water quality standards

> serve the dual purposes of establishing the water quality goals for a specific water body and serve as the regulatory basis for the establishment of water-quality-based

> treatment controls and strategies beyond the technology-based levels of treatment required by sections 301(b) and 306 of the Act.

40 C.F.R. § 131.2.

If the effluent limitations established in the various NPDES permits issued to those discharging into a particular water body are not sufficiently stringent to implement the water quality standards established for that body, the statute requires the State to identify and prioritize those waters. The State then must establish maximum discharge levels for specified pollutants that are calculated to implement applicable water quality standards. 33 U.S.C. § 1311(d).

This differentiation between effluent limitations and water quality standards is carried through to the citizen suit provision of the Clean Water Act, which authorizes citizens to enforce an "effluent standard or limitation" and defines that term to include "a permit or condition thereof issued under section 1342 of this title, which is in effect under this chapter . . .." 33 U.S.C. § 1365. Respondents claimed that because the City's NPDES permit contained a general reference to water quality standards, all of the State water quality standard regulations became enforceable by citizens in federal court, even though they were not translated into effluent limitations in the City's permit.

B. Citizen Suit Enforcement of Water Quality Standards Is an Unwarranted Expansion of Federal Court Jurisdiction

The decision in *NWEA I* notes that every court that has addressed the issue has held that the citizen suit provision does not authorize direct suits to enforce water quality standards.[4] The *NWEA II* majority concluded that even if the citizen suit provision does not include direct authorization to enforce water quality standards, a general reference to water quality standards in an NPDES permit gives federal courts jurisdiction to enforce those State regulations. This conclusion, however, confuses the fundamental nature of effluent limitations and water quality standards and conflicts with the Second Circuit's decision in *Atlantic States Legal Foundation Inc. v. Eastman Kodak* Co., 12 F.3d 353 (2d Cir. 1993), *cert. denied,* ___ U.S. ___, 115 S.Ct. 62, 130 L.Ed. 2d 19 (1994), regarding the scope of federal citizen suit jurisdiction under the Clean Water Act.

Moreover, it is contrary to established federal law to say that the State permit writer can create federal court jurisdiction where Congress has declined to do so. *See*

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[4]*NWEA I* cites the following cases, in addition to *Oregon Natural Resources Council v. United States Forest Service,* 834 F.2d 842 (9th Cir. 1987), for having rejected the proposition that the Act gives citizens have standing to enforce water quality standards: *New York State v. United States*, 620 F. Supp. 374 (E.D.N.Y. 1985); *McClellan Ecological Seepage Situation (MESS) v. Weinberger*, 707 F. Supp. 1182 (E.D. Cal. 1988).

Bender v. Williamsport Area School Dist., 475 U.S. 534, 546, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986) (federal courts have only the jurisdiction given by the Constitution and federal statute); *Insurance Corp. v. Compagnie des Bauxites*, 456 U.S. 694, 701, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982) (agreement of the parties cannot confer jurisdiction on federal courts).

The facts in the *Kodak* case are closely analogous to those presented here. There, Kodak's permit established effluent limitations for specific pollutants. The plaintiff's citizen suit alleged violations of Sections 301 (33 U.S.C. §1311) and 402 (33 U.S.C. § 1342) of the Clean Water Act based on the discharge of other pollutants not listed in Kodak's permit. The plaintiff relied on a permit provision that stated:

> [T]he discharge of any pollutant not identified and authorized or the discharge of any pollutant more frequently than or at a level in excess of that identified and authorized by this permit shall constitute a violation of the terms and conditions of this permit.

12 F.3d at 359.

The Court in *Atlantic States v. Kodak* makes the jurisdictional point ignored by the Ninth Circuit in *NWEA II* - that the scope of federal jurisdiction may not be expanded by the actions of State permit issuers. The Second Circuit held that, although they could be enforced by the States or the EPA,

> "state regulations, including provisions of SPDES [State Pollutant Discharge Elimination System] permits, which mandate 'a greater scope of coverage than that required, by federal CWA and its implementing regulations are not enforceable through a citizen suit under 33 U.S.C. § 1365."

Id.

In support of that conclusion, the Second Circuit cited the EPA regulations, which state that nothing in the agency's procedures for approving, revising and withdrawing State programs precludes a State from:

> (2) Operating a program with a greater scope of coverage than that required under this part. If an approved State program has greater scope of coverage than required by Federal law the additional coverage is not part of the Federally approved program.

40 C.F.R. § 123.1(i)(2).

NWEA II also conflicts with an earlier Second Circuit decision in *United States v. Hooker Chemicals & Plastics Corp.*, 749 F.2d 968 (2d Cir. 1984), regarding the scope of jurisdiction created in § 505, 33 U.S.C.

§ 1365.[5] In that case, four environmental organizations attempted to intervene in an action brought by the United States against the defendant, in part to prevent "an imminent and substantial endangerment to the health of persons or to the welfare of persons," 33 U.S.C. § 1364, under the Clean Water Act. The Court of Appeals determined that citizens could intervene if they could have initiated the action under the citizen suit provision. It concluded, however, that § 1365 did not authorize such suit.

The court relied upon analysis similar to that employed by the Ninth Circuit in *NWEA I*, but abandoned in *NWEA II*. In particular, the Second Circuit's review of the legislative history of the citizen suit provision and the 1972 amendments to the Clean Water Act led it to conclude that the citizen suit provision does not authorize suits where courts would be required to "make technical evaluations relating to pollutants for which no effluent levels have been established." 749 F. 2d at 980.

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[5]Both of the Second Circuit decisions may have drawn upon that Court's clear and forceful analysis of the distinction between effluent limitations and water quality standards in *Bethlehem Steel v. Environmental Protection Agency*, 538 F. 2d 513, 515 (2d Cir. 1976)

> ("[A]lthough water quality standards and effluent limitations are related . . . the two are entirely different concepts and the difference is at the heart of the 1972 amendments [to the Clean Water Act.]").

Although it arises in quite a different context, the analysis of the Court of Appeals for the District of Columbia Circuit in *American Paper Institute, Inc. v. Environmental Protection Agency*, 996 F. 2d 346 (D.C. Cir. 1993), also differs significantly from the analysis in *NWEA II* regarding the relationship between effluent limitations and water quality standards. In that case, the plaintiff challenged the regulations adopted by EPA requiring writers of pollution discharge permits to use one of three methods to interpret State water quality standards containing narrative criteria so as to "create precise chemical-specific effluent limitations in those permits." 996 F. 2d at 348.

The court concluded that:

> The regulation thus seems to provide an eminently reasonable means of effectuating the intent of the previously adopted narrative criteria as well as *Congress' own intent*, made explicit in section 301 of the CWA, *that all state water quality standards be enforced through meaningful limitations in individual NPDES permits*. (Emphasis added).

Id.

Both the EPA regulation and the Court's analysis recognize that the intent of the Clean Water Act is to enforce water quality standards in citizen suits only through the effluent limitations established in each permit - not

through the wholesale incorporation of "generic standards" relating to water quality.

Finally, *NWEA II* conflicts with the Ninth Circuit's own decision in *Oregon Natural Resources Council v. United States Forest Service, supra*. In that case, the citizen suit plaintiffs claimed that road building and timber harvesting activities to be conducted on a timber sale would violate water quality standards. Although there was no point source discharge involved, the plaintiffs claimed that § 1311(b)(1)(C) incorporates water quality standards established under § 1313 and is not limited to point sources. There the Ninth Circuit stated:

> [E]ffluent limitations may be derived from state water quality standards and may be enforced when included in a discharger's permit. We agree with defendants that it is not the water quality standards themselves that are enforceable in section 1311(b)(1)(C), but it is the 'limitations necessary to meet' those standards, or 'required to implement' the standards.

834 F.2d at 850. It held that the "limitations" referred to in § 1311(b)(1)(C) are effluent limitations and are applicable only to point source discharges. The Court concluded that the plaintiffs did not have a cause of action under the citizen suit provision. *Id*. Although the context is different, the analysis of the role of water quality standards in *NWEA II* conflicts with the analysis in *Oregon Natural Resources Council*.

In sum, the *NWEA II* majority interpretation of the Clean Water Act conflicts with the language of the statute and the interpretation of other Circuit Courts of Appeals, and authorizes an unwarranted expansion of federal court jurisdiction.

C. The Decision in *NWEA II* Abrogates the Permit as a Shield Doctrine

Under the *NWEA II* ruling, permit holders such as the City can no longer rely on the effluent limitations defined by the regulatory body in their NPDES permits. It puts each such permit holder at risk of citizens suits if the entire water body fails to meet water quality standards. As *NWEA I* pointed out:

> Under a water quality based enforcement scheme such as the pre-1972 Act, dischargers faced problems in planning and regulating the legality of their actions because this legality is dependent on natural conditions such as the weather and third parties' discharges. . . . As a practical matter, NWEA's interpretation of § 1365 places dischargers such as the City in the same untenable pre-1972 position. No matter how much planning the City were to engage in, as long as it discharges effluent from the CSOs even under the auspices of a duly authorized permit, it is in danger of being in violation of the Act. Given the extreme cost of pollution abatement, industry and cities must have the ability to plan for

> the future with the assurance that if they remain within concrete permit parameters, they will remain on the correct side of the law.

App-25.

The opinion in *NWEA II* also directly conflicts with the *Kodak* Court's interpretation of the permit as a shield provision of the Clean Water Act. The court in *Kodak* noted that "the EPA's actions and policy statements have frequently contemplated discharges of pollutants not listed under an NPDES or SPDES permit." 12 F.3d at 357-58. One such policy is the "permit as a shield" policy adopted by EPA under § 402(k), 33 U.S.C. § 1342(k). Under that statute, compliance with an NPDES permit is deemed to be compliance with specified provisions of the Clean Water Act for purposes of enforcement, including enforcement by citizens. An EPA policy memorandum regarding the permit as a shield provision states:

> [A] permit provides authorization and therefore a shield for the following pollutants resulting from facility processes, waste streams and operations that have been clearly identified in the permit application process when discharged from specified outfalls:
>
> * * * *
>
> 2) Pollutants for which the permit authority has not established limits or other permit conditions, but which are specifically

> identified as present in facility discharges during the permit applications process[.]

Environmental Protection Agency, "Memorandum: Policy Statement on Scope of Discharge Authorization and Shield Associated with NPDES Permits," July 1, 1994, App-175-76.

The Second Circuit relied in part on this Court's explanation of § 402(k) in *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 n. 28, 97 S.Ct. 965, 51 L.Ed.2d 204, 223 n. 28 (1977).

> "The purpose of § 402(k) seems to be . . . to relieve [permit holders] of having to litigate in an enforcement action the question whether their permits are sufficiently strict. In short, § 402(k) serves the purpose of giving permits finality."

However, under the Ninth Circuit's ruling in *NWEA II*, the City will have not finality because:

> No matter how much planning the City were to engage in, as long as it discharges effluent from the CSOs even under the auspices of a duly authorized permit, it is in danger of being in violation of the Act.

NWEA I, App-25. The Ninth Circuit's decision in *NWEA II* destroys that permit as a shield protection. That decision, like the contentions of the plaintiff in the *Kodak*

case, "stands [the regulatory framework of the Clean Water Act] on its head." 12 F.3d at 357.

II. AN IMPORTANT QUESTION OF FEDERAL LAW HAS BEEN WRONGLY DECIDED BY MISAPPLICATION OF A DECISION OF THIS COURT

The Ninth Circuit panel in this case based its reversal of *NWEA I* on this Court's decision in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, ___ U.S. ___, 114 S. Ct. 1900, 128 L.Ed.2d 716 (1994), even though that case, as Judge Kleinfeld noted in his dissent, "does not involve a citizens' suit, says nothing about citizens' suits, and implies nothing about citizens' suits." App-62 *NWEA II* uses *Jefferson County* to muddle the distinction between effluent limitations and water quality standards that was carefully established by the Clean Water Act - a distinction that this Court has always recognized.

The issue in *Jefferson County* was whether the State environmental agency properly conditioned a § 401 (33 U.S.C. §1341) permit for a hydroelectric project on requirements of State law that did not relate to the quality of the discharge from the facility, but rather on the maintenance of stream flow. This Court ruled that § 401 allowed the State to do so, based on the language of that section.

NWEA II mischaracterizes the issues and this Court's analysis in *Jefferson County*. By relying on selected words and phrases from the opinion, it concludes

that "The county's losing argument in *Jefferson County* is very similar to the argument advanced by Portland in the instant case." App-55. However, the county's contention that the State may not rely upon "designated uses" but only upon water quality "criteria" in imposing limitations for a permit has no relation to the City's contentions in this case. The instant case does not challenge the authority of the State to impose specific limitations translated from water quality standards to a specific permit, as was done in *Jefferson County*. It poses the very different question whether water quality standards that have not been translated into specific effluent limitations in an NPDES permit may be enforced by a citizen suit in federal court. The ability of States to impose conditions under § 401 holds a significantly different position in the statutory scheme than the ability of citizens to enforce water quality standards through an NPDES permit.

Section 401 requires that States provide a water quality certification before a federal license or permit may be issued for activities that may result in discharge to navigable waters. In that process, the State's function is not unlike its function as the writer of an NPDES permit - it must set forth specific requirements for the proposed activities, based on water quality standards and other requirements. In *Jefferson County*, the State did so - it required a minimum stream flow of between 100 and 200 cfs, depending on the season. 128 L.Ed.2d at 726.

This Court recognized throughout *Jefferson County* that it is the specific translation of water quality standards by the State agency that is required and that will be enforced:

> Washington's Class AA water quality standards are typical in that they contain several open-ended criteria which, like the use designation of the River as a fishery, must be translated into specific limitations for individual projects.

Id. at *730. Cf. Arkansas v. Oklahoma*, ___ U.S. ___, 112 S.Ct. 1046, 117 L.Ed 2d 239, 251 (1992) (articulating the distinction between effluent limitations and water quality standards); *Environmental Protection Agency v. State Water Resources Control Board*, 426 U.S. 200, 202-205, 96 S.Ct. 2022, 48 L.Ed. 2d 578 (1976) (water quality standards were retained as the ultimate goal of pollution control, but enforcement would be handled at the "end of the pipe.") The Ninth Circuit decision in *NWEA II* ignores that distinction.

The Ninth Circuit's misapplication of *Jefferson County* is dramatic. On the basis of this Court's holding that under §*401 States* may impose *specific limitations* for individual projects based on State water quality standards, the Ninth Circuit panel reversed itself to hold that under §*505 citizens* may enforce water quality standards that have *not been translated* into specific limitations for an NPDES permit.

This misapplication of *Jefferson County* distorts the statutory scheme enacted in the Clean Water Act. For permit holders, such as the City of Portland, it takes away the certainty the Act intended to provide. It puts federal courts in the business of interpreting and applying water quality standards - the position the Clean Water Act

reserved for the state and federal regulators. Moreover, it violates the principle that federal court jurisdiction may only be created by the constitution or by Congress.

CONCLUSION

For the foregoing reasons, the City's petition for certiorari should be granted.

Respectfully submitted,

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